work done by Gulf Power, or its contractor ("Red Simpson"), for Knology's benefit was paid in *full by Knology (payment that include a 30 percent overhead in addition to Red Simpson* invoices).

I. David Tessieri.

David Tessieri is a Director of Sales for Osmose Utilities Services and was the representative of Osmose that Gulf Power made available to Complainants for deposition. Complainants have designated sections of Mr. Tessieri's deposition testimony. Those sections include Mr. Tessieri's testimony that Osmose was not given any information by Gulf Power about what constitutes a pole at full capacity; that Osmose was not familiar with Gulf Power's permitting procedure calling for the use of make-ready; that Osmose did not consider the effect of make-ready upon a pole's ability to accommodate attachments; that Osmose compiled no data on the period of time, or range of dates, when the poles it surveyed contained any NESC violations; that Osmose has no information about what party was responsible for creating the NESC or other spacing violations that its technicians recorded; and the decision to stop, after only two months, the Osmose survey, leaving only 6.4% of Gulf Power's joint use poles having been surveyed visually and a lesser percentage having had actual measurements recorded.

IV. DESCRIPTION AND STATEMENT OF RELEVANCE OF COMPLAINANTS' EXHIBITS

1. Complainants' Exhibit 1 is the Curriculum Vitae of Michael T. Harrelson, one of Complainants' expert witnesses. It describes Mr. Harrelson's qualifications and background, including his education, work experience, consulting, memberships, and prior testimony.
2. Complainants' Exhibit 2 is Gulf Power's CATV Permitting Procedure. It shows that make-ready is a routine part of Gulf's permitting process, that Gulf's

engineers are to issue permits to attach once make-ready costs are paid, and that make-ready is used to "provide space for Licensee's attachments."

3. Complainants' Exhibit 3 is the "Statement of Work" prepared by Gulf Power for the pole audit conducted in this case by Osmose Utilities Services. It shows, among other things, that all Gulf Power instructed Osmose to do was record certain measurements on one occasion, for poles according to a definition of a "crowded" pole, which was based upon the existence of certain NESC or other clearance violation. It does not contain any definition or information about what constitutes a pole at "full capacity"; any instructions about determining who caused the NESC or other violations; how long such violations have existed; whose responsibility it is to correct such violations; or how make-ready to correct such violations would affect the accommodation of additional attachments on the poles.

4. Complainants' Exhibit 4 is a list of documents and standards relied upon by Michael Harrelson in preparing his expert summary in this case.

5. Complainants' Exhibit 5 consists of excerpts from the Southern Company Overhead Distribution Construction Manual, a manual that Gulf Power follows for the purpose of standardization and good electric distribution practices. Mr. Harrelson's testimony refers to these excerpts.

6. Complainants' Exhibit 6 consists of Mr. Harrelson's review and analysis of the 50 specific poles identified by Gulf Power in this case. It includes illustrative pictures taken by Gulf Power and by Mr. Harrelson of those poles.

7. Complainants' Exhibit 7 consists of Mr. Harrelson's review and analysis of the 50 *specific poles identified by the Complainants in this case. It includes illustrative* diagrams and pole data, as well as pictures taken by Complainants, Mr. Harrelson, or Gulf Power of those poles.

8. Complainants' Exhibit 8 consists of notes prepared by Mr. Harrelson regarding poles designated by Gulf Power and Complainants that assisted Mr. Harrelson in the preparation of his testimony.

9. Complainants' Exhibit 9 is an enlargement of a chart prepared by Gulf Power that describes data compiled by Osmose about 40 Gulf Power poles.

10. Complainants' Exhibit 10 consists of excerpts from "Recommended Practices for Coaxial Cable Construction and Testing" (Second Edition), a manual that assisted Mr. Harrelson in the preparation of his testimony.

11. Complainants' Exhibit 11 is the 2002 Edition of the National Electrical Safety Code, the national safety standard for electric supply and communication lines. It contains provisions that specify various clearances between attachments on distribution poles.

12. Complainants' Exhibit 12 is the NESC Handbook (Fifth Edition), published by the Institute of Electrical and Electronics Engineers.[62]

13. Complainants' Exhibit 13 consists of Gulf Power "CATV Permit Record" documents produced by Gulf Power to Complainants concerning the years 1999 through 2003. These records indicate that Gulf Power has issued more permits to attach to its poles without requiring make-ready than permits which require make-

[62] Complainants inadvertently listed as Exhibit 12 a version of the NESC Handbook published by McGraw Hill. Complainants will provide a copy of the IEEE Handbook to the Presiding Judge and can make a copy available to any of the parties that do not already have one.

ready. When these records are compared with Gulf Power's claim in the Osmose Final Report, *based upon the existence of NESC clearance violations, that nearly* three-quarters of its poles are at "full capacity," this shows that Gulf Power is not properly fulfilling its responsibility of administering its poles so as to comply with the NESC.

14. Complainants Exhibit 14 consists of data compiled by Gulf Power in its 2001 pole inventory about the average number of communications attachments. Gulf's data claims that the average number of communications attachments is fairly small – 1.72 communications attachment per pole. This data was apparently used by Gulf Power in its "replacement cost" methodology.

15. Complainants Exhibit 15 consists of measurements and data compiled by Complainant Comcast about the ten poles it identified, which are part of Complainants' 50 poles. This information is also part of Complainants' Exhibit 7.

16. Complainants Exhibit 16 consists of measurements and diagrams compiled by Complainant Brighthouse about the ten poles it identified, which are part of Complainants' 50 poles. This information is also part of Complainants' Exhibit 7.

17. Complainants' Exhibit 17 consists of measurements and data compiled by Complainant Cox Communications about the 20 poles it identified, which are part of Complainants' 50 poles. This information is also part of Complainants' Exhibit 7.

18. Complainants' Exhibit 18 consists of measurements and diagrams compiled by Complainant Mediacom about the ten poles it identified, which are part of Complainants' 50 poles. This information is also part of Complainants' Exhibit 7.

19. Complainants Exhibit 19 contains, with a cover letter from Gulf Power, a copy of the new Pole Attachment Agreement that, in mid-2000, Gulf Power wanted to force Cox Communications (and the other Complainants in this case) to sign in order to maintain their decades-long cable attachments. Exhibit E to the new Pole Attachment Agreement purports to require the attacher to pay a yearly attachment rate of $38.06 per pole.

20-21. Complainants Exhibits 19 and 20 consist of correspondence exchanged between Gulf Power and Cox Communications about the new pole rate Gulf wanted to force Cox to pay for the year 2001, a rate of $40.60 per pole per year. Cox's letter explains that Gulf Power's new rate is legally invalid and that Cox will continue to pay the previously negotiated rate of $6.20 per year.

22-23. Complainants Exhibits 22 and 23 consist of correspondence exchanged between Gulf Power and Mediacom Communications about the new pole rate Gulf wanted to force Mediacom to pay for the year 2000, a rate of $38.06 per pole per year. Mediacom's letter explains that Gulf Power's new pole rate is legally invalid and that Mediacom will continue to pay the previously negotiated rate of $5.98 per year.

24-25. Complainants Exhibits 24 and 25 consist of correspondence exchanged between Gulf Power and Comcast Cablevision about the new pole rate Gulf wanted to force Comcast to pay for the year 2000, a rate of $38.06 per pole per year. Comcast's letter explains that Gulf Power's rate is legally invalid and that Comcast will continue to pay the previously negotiated rate of $5.65 per year.

26-27. Complainants Exhibits 26 and 27 consist of correspondence exchanged between Gulf Power and Time Warner Entertainment-Advance/Newhouse [Complainant *Brighthouse] about the new pole rate Gulf wanted to force Brighthouse to pay for* the year 2001, a rate of $40.60 per pole per year. Brighthouse's letter explains that Gulf Power's rate is legally invalid and that Brighthouse will continue to pay the previously negotiated rate of $6.30 per year.

28. Complainants' Exhibit 28 is the Proposal for Joint Use Audit prepared by Gulf Power for Osmose Utilities Services. The Proposal, like the Statement of Work, states that the purpose of the audit is to identify poles defined as "crowded" and to have measurements taken for poles that are deemed to be "crowded." The Proposal does not contain a definition or other information about what constitutes a pole "at full capacity."

29-35. Complainants Exhibits 29-35 are Gulf Power's April through September 2005 Status Reports on the progress of the Osmose pole audit. They are part of the record but were not admitted into "evidence."

36. Complainants' Exhibit 36 is Gulf Power's Final Report on the Osmose pole audit. It states that, although Osmose was supposed to survey the 150,000 poles in its system that were joint use poles, Osmose in fact surveyed only 6.4% (fewer than 10,000 poles). The Final Report does not make clear how many poles Osmose actually recorded measurements for (Osmose conducted a visual observation only on its "first pass" but only recorded measurements of poles on a "second pass").

37. Complainants' Exhibit 37 is Gulf Power's Proffer of "full capacity" pole evidence that the Presiding Judge required it to file on October 17, 2005. It includes

information about 3 poles surveyed by Osmose and various data concerning poles containing attachments by the Knology company.

38. Complainants' Exhibit 38 consists of various Gulf Power maps of poles that were surveyed by Osmose in Pensacola, Florida. These maps purport to show what poles Osmose deemed "not crowded" and which poles Osmose believed were "crowded" on "first pass" and "second pass."

39. Complainants' Exhibit 39 is Complainants' Identification of 50 poles; it includes color photographs and addresses for ten poles containing Brighthouse attachments; ten poles containing Mediacom attachments; ten poles containing Comcast attachments; and 20 poles containing Cox attachments.

40. Complainants' Exhibit 40 is a Correction to Complainants' identification of poles that includes a photograph of pole number 19 (inadvertently omitted from the filing that is Complainants' Exhibit 39) and a corrected address for pole number 17.

41. Complainants' Exhibit 41 is the Curriculum Vitae of Patricia Kravtin, one of Complainants' expert witnesses. It describes Ms. Kravtin's qualifications and background, including her education, work experience, consulting, publications, and prior testimony.

42. Complainants' Exhibit 42 is a List of Documents reviewed by Ms. Kravtin in preparing her expert summary in this case.

43. Complainants' Exhibit 43 consists of Complainants' Calculations of Maximum Cable Pole Attachment rates for Gulf Power under FCC regulations using Gulf Power's FERC cost accounts.

44. Complainants' Exhibit 44 consists of Gulf Power's "replacement cost" calculations that led to the rates it sought to charge Complainants beginning in the *year 2000.*

45. Complainants' Exhibit 45 consists of Gulf Power FERC Form 1's containing information about Gulf Power's costs.

46. Complainants' Exhibit 46 is a complete copy of Complainants' original Complaint, with exhibits thereto, filed in this proceeding on July 10, 2000. It is part of the record but was not admitted into "evidence."

47. Complainants' Exhibit 47 is a copy of the decision of the United States Court of Appeals for the Eleventh Circuit in *Alabama Power v. FCC*, 311 F.3d 1357 (2002), the decision that sets forth the principal legal criteria and standards to be applied, under the HDO, in this case.

48. Complainants' Exhibit 48 is a copy of the order of the Federal Communications Commission that preceded the Eleventh Circuit decision that is Complainants' Exhibit 47. Alabama Power petitioned for review to the Eleventh Circuit from this Commission order, and the Court of Appeals dismissed the petition, leaving the Commission's ruling as an enforceable and legally binding precedent. In the Commission decision, *Alabama Cable Telecommunications Assoc. v. Alabama Power Co.*, 16 F.C.C.R. 12209 (2001), the Commission ruled, *inter alia*, that there is no non-monopoly market for pole attachments, that a market value standard does not apply to pole attachments, and, in particular, that replacement costs may not be used to value pole attachments.

49-54. Complainants' Exhibits 49-54 include copies of Gulf's Power's Petition for Reconsideration and Request for Evidentiary Hearing; its Description of Evidence *that it claimed would satisfy the Alabama Power test; the Hearing Designation* Order; Complainants' October 20, 2004 Petition for Clarification; and both Gulf Power's and Complainants' Preliminary Statement on Alternative Cost Methodology. These documents are part of the record but were not admitted into "evidence."

55. Complainants' Exhibit 55 is a copy of Complainants' Responses to Gulf Power Company's First set of Interrogatories and Requests for Production of Documents. At the admission session, Complainants withdrew this exhibit.

56. Complainants' Exhibit 56 is a copy of Gulf Power's Responses to Complainants' First Set of Interrogatories. Many of Gulf Power's answers are highly relevant and significant, because they show that Gulf cannot satisfy the Eleventh Circuit Alabama Power standards, including Gulf's substantive distinction between "crowding" and "full capacity" (Interrogatory No. 2); its admission that it has no proof of any actual buyers or lessors of pole space "waiting in the wings" who could not be accommodated (Interrogatory No. 4); its admission that it has no proof of any specific, quantifiable "higher valued use" for Complainants' pole space that it was unable to use (Interrogatory No. 5); Gulf's refusal to identify the actual "marginal costs" caused by Complainants' attachments (Interrogatory Nos. 7 and 37); its concession that it is not claiming damages for actual losses (Interrogatory No. 9); its inability to identify a single instance in which it was not paid for make-ready (Interrogatory No. 20); and its inability to describe any

specific instance needed to reserve space on poles occupied by Complainants (Interrogatories 31, 34, and 35).

57. *Complainants Exhibit 57 is a copy of Gulf Power's Responses to Complainants'* First Set of Requests for Production of Documents. This document is part of the record but was not admitted into "evidence."

58. Complainants Exhibit 58 is a copy of Gulf Power's Supplemental Responses to Complainants' First Set of Interrogatories to Respondent. These answers, which were only provided after Complainants filed a motion to compel and the Court issued its August 5, 2005 Discovery Order, are important because they show, *inter alia*, that Gulf Power is unable to identify specific make-ready records or other documents that establish that it incurred any actual loss pertaining to poles containing Complainants' attachments, that Gulf Power has no proof of any specific, quantifiable higher valued use, and that Gulf Power does not maintain records for specific poles.

59-60. Complainants' Exhibits 59 and 60 are copies of Gulf Power's Responses to Complainants' Second Set of Document Requests and Gulf Power's Itemization of Evidence that it referred to in its January 8, 2004 "Description of Evidence." These documents are part of the record but were not admitted into "evidence."

61. Complainants' Exhibit 61 is a copy of Gulf Power's Second Supplemental Responses to Complainants' First Set of Interrogatories. These answers, which were only provided after Complainants filed a motion to compel and the Court issued its September 21, 2005 Second Discovery Order, are important because they show, *inter alia*, again that Gulf Power is unable to identify specific make-

ready records or other documents that establish that it incurred any actual loss pertaining to poles containing Complainants' attachments, that it has no proof of any unreimbursed costs pertaining to make-ready, and that Gulf Power has no documents (other than its standard "spec plates") that would show any need to reserve particular space on poles containing Complainants' attachments.

62-72. Complainants' Exhibits 62-72 consist of copies of Gulf Power's Supplemental Responses to Complainants' Second Set of Document Requests; Gulf Power's Second Supplemental Responses to Complainants' Second Set of Document requests; Complainants' Motion to Compel; the Discovery Order of August 5, 2005; Complainants' second Motion to Compel; the Second Discovery Order of September 22, 2005; Gulf Power's Motion to Reconsider Limited Portions of the Second Discovery Order; Complainants' third Motion to Compel; the Third Discovery Order of November 18, 2005; Complainants' Motion to Dismiss; and Gulf Power's Response to Complainants' Motion to Dismiss. These documents are part of the record but were not admitted into "evidence."

73. Complainants' Exhibit 73 is a copy of Complainants' Responses to Gulf Power's Second Set of Interrogatories and Document Requests. At the admission session, Complainants withdrew this exhibit.

74. Complainants' Exhibit 74 is a copy of a Pole Attachment Agreement between Gulf Power and the School District of Escambia County. This Pole Agreement, which provides for payment of $1 for the right to attach to Gulf Power facilities, shows that Gulf Power did not attempt to impose on this attacher any "just

compensation" pole rate at or approximating the $40.60 rate that it was seeking from the Complainants at the same time.

75. *Complainants' Exhibit 75 is a letter from Gulf Power to an attacher called* Southern Light. The letter is an example of where Gulf Power assessed make-ready costs against Southern Light in order to attach to Gulf Power poles, and it shows that Gulf Power permits make-ready work to proceed after it receives payment.

76. Complainants' Exhibit 76 is a letter from Gulf Power to Southern Light that shows that Gulf Power will bill attachers for additional work that it identifies after an initial make-ready cost estimate is provided or that it may have "missed or postponed due to various reasons." It also shows that Gulf Power's policy is to permit make-ready work after it receives payment.

77. Complainants' Exhibit 77 consists of correspondence between an attacher called Adelphia Business Solutions ("ABS") and Gulf Power. The correspondence is relevant and significant because it undermines Gulf Power's claim that attachers who have paid it a pole attachment rate of $40.60 have necessarily done so willingly. In this correspondence, ABS states that it is signing Gulf Power's new pole agreement under duress but that it would like to reserve its rights to challenge Gulf Power's "overreaching" on various provisions.

78-82. Complainants' Exhibits 78-82 include copies of decisions by the Florida Public Service Commission pertaining to Gulf Power's cost recovery and the PSC's new Eight-Year Pole Inspection requirement; a Study referred to by Complainants' expert witness Patricia Kravtin; and e-mails between counsel pertaining to make-

ready and Gulf Power's failure, in its February 10, 2005 filing, to provide numerous items of information required by the Presiding Judge's Orders. These documents are marked for identification but were not admitted into "evidence."

83. Complainants' Exhibit 83 is Gulf Power's Supplemental Filing Regarding Its Fifty Pole Identification. This filing is significant because it makes plain that Gulf Power wishes to conflate the first prong of the *Alabama Power* test, proof of poles at "full capacity," with the second prong, proof of actual loss, through identification of a buyer waiting in the wings or a demonstrable, quantifiable higher valued use, for space on particular poles containing Complainants' attachments. The filing, which argues that Gulf's poles "establish a lost opportunity . . . because those poles are "crowded" or at "full capacity" under the *Alabama Power* test," makes plain that Gulf Power has no proof of any actual loss under the second prong of Alabama Power.

V. EVIDENTIARY ISSUES

1. Complainants Object To All Evidence That Does Not Meet The *Alabama Power* Requirement of Proof Of Actual Loss

As discussed above in Section I (D)(2) of this brief, Gulf Power fails to meet, with respect to the 50 poles it has designated for this hearing, the "lost opportunity" test, the second prong of the *Alabama Power* test. In particular, Gulf Power's admission, as noted by the Presiding Judge in the Discovery Order, FCC 05M-38, p. 6, that "Gulf Power is not claiming damages for any actual loss," is dispositive of Gulf Power's claim. Even in its Pre-Trial Brief, Gulf attempts to conflate "full capacity" with the proof of loss that the Eleventh Circuit required. See Gulf's Pre-Trial Brief, 15. However, the Constitution requires that, for takings claims, which is the basis for Gulf Power's pole rate increase, the owner only be compensated for "loss,"

not any benefit or gain to the "taker." The Eleventh Circuit emphasized this and referred in its opinion specifically to the need for proof of a "missed" sale to others and evidence that Gulf Power was "out more money." 311 F.3d at 1369-70; *see also Klay*, 425 F.3d at 986. Accordingly, Complainants object to the introduction of any evidence and/or request that any such evidence be excluded, about any purported "hypothetical" loss, or any evidence of what Gulf Power has been able to charge other parties for their pole attachments, since such payments obviously are being received and do not constitute evidence of a "loss" or "missed opportunity" to Gulf Power.

Moreover, to the extent Gulf Power has used a "bait and switch" tactic by seeking the opportunity to submit evidence "specifically targeted to meet the Eleventh Circuit's test," gaining that opportunity in the *HDO*, and then abandoning the Eleventh Circuit test and instead offering a challenge to the FCC's formula, this proceeding should be summarily dismissed. *Compare* Gulf Power Company's Petition for Reconsideration and Request for Evidentiary Hearing, filed June 23, 2003 at 11, 12 (Compls. Ex. 49 marked for identification)(quoted language seeking leave to submit evidence "targeted" to the Eleventh Circuit test) and Description of Evidence Gulf Power Seeks to Present in Satisfaction of the Eleventh Circuit's Test, filed Jan. 8, 2004 at 2 (Compls. Ex. 50 marked for identification) (undertaking to satisfy the Eleventh Circuit's test) *with HDO*, ¶ 5 (affording Gulf Power the opportunity to present the evidence delineated in its Description of Evidence at hearing). Challenging the FCC's formula, promoting a methodology and additional cost accounts that have been considered and rejected is outside the scope of the *HDO*, precluded by *res judicata* and/or collateral estoppel, and an untimely challenge to the *Alabama Power* decision. This result is not in derogation of the *HDO* or Gulf Power's rights. The Commission said in the *HDO* that Gulf Power acknowledged that

"[o]nce the rule in [the *Alabama Power Decision*] becomes final, either through denial of certiorari review or an ultimate ruling on the merits by the Supreme Court, it will be binding upon the FCC – it will set the standard." *HDO*, ¶ 4, n.17. Moreover, the Commission noted that it was expressing "no opinion about the ultimate merits of the Petition – *i.e.*, whether Gulf Power is entitled to receive compensation above marginal cost – leaving that determination to an ALJ." *HDO*, ¶ 5, n. 21. Finally, because the critical aspect of any evidence that would allow Gulf Power to recover anything more than marginal costs would be proof of an actual "lost opportunity," and Gulf Power's proof on "lost opportunity" is simply the claim that Gulf has foregone the difference between the rates paid by Complainants under the FCC formula and the rates calculated under Gulf's Replace Cost theory, this matter can be disposed of without a hearing.[63] The Eleventh Circuit said that no hearing would be required on a legal issue such as "methodology" that is used to calculate the level of just compensation if there are no material facts in dispute. *Alabama Power*, 311 F.3d at 1372.

Gulf Power's case reduces to a tautology that it is entitled to a Replacement Cost rate for poles because its poles are crowded and it has lost the opportunity to sell to the cable companies at the Replacement cost rate. The Eleventh Circuit considered and rejected any notion that this "lost opportunity" would justify a higher rate and thus it is wholly irrelevant to the constitutional analysis. *Alabama Power*, 311 F.3d at 1369. Instead, the Eleventh Circuit gave the precise circumstance where a utility may be entitled to recover more than marginal cost. And selling to the cable attacher at the replacement cost rate is not it.

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[63] In answering Interrogatory No. 9, Gulf Power explained that it "*is not claiming as damages any actual loss other than the difference in rates, plus interest.*" (Compls. Exh. 56, p. 6)

2. Complainants' Object To The Introduction Of Any Evidence Concerning Gulf Power's Alleged "Replacement Costs"

As discussed above in Section I(D)(3) of this brief, Gulf Power may not, as a matter of law, use "replacement costs" as a method for calculating its annual utility pole attachment fees, because (1) they are transparently based upon the concept of "gain to the taker," rather than "loss to the owner," and are therefore not permitted by the Constitution; (2) they are not related to the capacity of particular poles containing Complainants' attachments or to any lost opportunity on such poles; and (3) they have been specifically rejected by the full Commission in its APCO Commission Order, 16 F.C.C.R. 12,209 at ¶ 57. Accordingly, Complainants object to the introduction of any such evidence and/or request that all such evidence be stricken from the record.

3. Complainants Object To The Introduction Of Any Evidence Concerning The Osmose Pole Audit

As discussed above in Section I(D)(1) of this brief, the pole audit conducted by Osmose has no probative value in this proceeding, because Osmose's pole survey did not use the standard of "full capacity" and did not produce evidence of poles at full capacity; did not consider Gulf's own permitting procedure for providing space through rearrangement or changeout; did not consider when NESC violations were created or how long they have existed or whether they remain, in violation of the Judge's Prehearing Order of December 15, 2004; did not consider who caused alleged NESC violations and who has a responsibility to cure them; and did not in fact do what Gulf Power claimed that it would. Accordingly, the Osmose data is not probative as to the first prong of the *Alabama Power* test, the requirement of showing individual poles at "full capacity." Complainants therefore object to the introduction of any such evidence and/or request that all such evidence be stricken from the record.

4. Complainants Object To The Introduction Of Any Testimony From Gulf *Power's Purported "Expert" Witness, Roger A. Spain, On The Grounds* That His Testimony Fails To Meet The "Reliability" and "Relevance" Requirements Under The Supreme Court's *Daubert* Ruling

The admissibility of testimony by expert witnesses is governed by Fed. R. Evid. 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702 (2002 Revised ed.). The Rule was amended in 2000 in response to *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Fed. R. Civ. P. 702, Advisory Committee Notes (2000 Amendments). Pursuant to *Daubert,* the trial judge, acting in a "gatekeeping" capacity, *Daubert,* 509 U.S. at 597, must determine at the outset whether an expert is proposing to testify to (1) scientific knowledge[64] that (2) will assist the trier of fact to understand or determine a fact in issue. *Id.* at 592. The objective of the *Daubert* gatekeeping requirement is "to ensure the reliability and relevancy of expert testimony." *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 151 (1999) ("*Kumho Tire*"). Under the Commission's procedural rules, Rule 702 governs the admissibility of all expert testimony in this case. *See* 47 C.F.R. § 1.351.

Rule 702 requires a determination of relevance: "whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Daubert,* 509 U.S. at 591 (quoting *United States v. Downing,* 753 F.2d 1224, 1242

[64] Since *Daubert,* the Supreme Court has clarified that the *Daubert* evidentiary standard for expert testimony is not limited, in application, to "scientific" knowledge, but also applies to "technical and other specialized knowledge" under Rule 702. *Kumho Tire Co. v. Carmichael, et al.,* 526 U.S. 137, 147-49 (1999)(recognizing there is "no clear line" between scientific and technical or other specialized knowledge, nor a "convincing need to make such distinctions").

(3rd Cir. 1985)). "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. The "helpfulness" standard in Rule 702 requires "a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id.* at 591-92. This element is often described as one of "fit." *Id.* at 591.

The Supreme Court's decision in *Kumho Tire* spoke directly to the issue of relevance and "fit." *See Kumho Tire,* 526 U.S. at 153-54. At issue in that case was expert testimony regarding the likely cause of a tire tread separation incident. The Court reasoned that the specific issue facing the trial court "was not the reasonableness *in general*" of the tire expert's use of a visual and tactile inspection to determine causation. *Id.* Rather, "[t]he relevant issue was whether the expert could reliably determine the cause of *this* tire's separation." *Id.* at 154.

In the instant case, the parties were permitted to offer one expert witness on methodology, facts and/or engineering related to the pole attachment survey, and one expert witness on economics and the amount of damages. *Florida Cable Telecomm. Ass'n, Inc.,* et al., *v. Gulf Power Co.,* Order, EB Dkt. No. 04-381 (Feb. 1, 2005). Gulf Power identified Roger Spain as its only expert, stating that he was retained to "estimate the fair market value of pole space taken on Gulf Power's poles." Spain Testimony, p. 4. However, because Mr. Spain's testimony is inadmissible under the standard set forth in *Daubert* and *Kumho Tire,* it must be struck.

In particular, the report and testimony offered by Roger Spain are irrelevant, at the outset, under the *Daubert* standard because his opinion is based on a fundamental assumption that does not apply in this case. The Eleventh Circuit holding in *Alabama Power v. FCC* frames the key issues in this case:

> before a power company can seek compensation above marginal cost, it must show with regard to each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting *in the wings or (b) the power company is able to put the space to a* higher-valued use with its own operations. Without such proof, any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation.

311 F.3d at 1370-71. In the instant proceeding, the Enforcement Bureau ordered that Gulf Power be allowed to offer evidence of its satisfaction of the *Alabama Power* test. *See HDO*, ¶ 5.

Because Gulf Power's expert takes issue with, and ultimately circumvents, the *Alabama Power* test, his testimony and report are inadmissible under *Daubert* for failing to adhere to the Eleventh Circuit's standards. In his Summary Report, Mr. Spain stated that he was engaged to "evaluate various methodologies for valuing Gulf Power Company's pole space." *See* Summary Report of Roger A. Spain (March 3, 2006), p. 1. In fact, his analysis was much more narrow: he testified at deposition that counsel to Gulf Power directed him to consider only the fair market value of attachments to Gulf Power poles. Spain Dep. at 31-32, 52-54, 86, and. 88-90 (Compls. Depo. Excerpts, pp. 221, 226, 231-32). In his report, he asserted similarly that he was "instructed by counsel" to perform an analysis "assuming the access and attachment to Gulf Power Company's poles by cable television companies results in a taking, and that as a result Gulf Power Company is entitled to fair market value." Summary Report, 1, 3. By focusing solely on "fair market value," Mr. Spain does not adhere to the issues as designated by *Alabama Power*. Chief Judge Sippel's Prehearing Order reiterated that the principal issue in this case as "whether Gulf Power is entitled to receive compensation above marginal cost...." See Prehearing Order (Sept. 30, 2004). Because Mr. Spain's analysis assumes that Gulf Power is entitled to "fair market value" instead of analyzing the extent to which Gulf Power could prove losses or harm exceeding the marginal costs of Complainants' attachments,, his analysis is

irrelevant to this case, and should be struck. *See* Spain Dep., 227 (Compls. Depo. Excerpts, p. 258)(Mr. Spain has no idea what the marginal costs to Gulf Power are of Complainants' attachments).

Mr. Spain's own testimony underlies one of the more significant problems with applying "fair market value" principles to pole attachment valuation: the transactions between Gulf Power and FCTA members at issue in this case, and indeed transactions generally between pole owners and cable television attachers, are not the result of free, arms-length bargaining. Even in his report, Mr. Spain notes that there is "often only one provider of pole space available for attachment" as well as a "historically limited number of potential cable television pole attachers," creating "a limited available market for those wishing to lease pole space." Summary Report, 2; *see also* Spain Dep., 98-99, 101-03 (Compls. Depo. Excerpts, pp. 234-35). By his own admission, "historically transactions between Gulf Power Company and cable television companies have not been conducted in a typical open market setting." Summary Report, 2; Spain Dep, 103-06 (Compls. Depo. Excerpts, pp. 235-36); *see also Alabama Power*, 311 F.3d at 1368 (reasoning that "There is not an active, unregulated market for the use of 'elevated communications corridors,...' and so an alternative to fair market value must be used.") In addition, it is illogical to rely on a fair market value approach – and in particular, a replacement cost methodology – when, by Mr. Spain's testimony, it would not be economically feasible for cable attachers to reproduce Gulf Power's elevated corridor and/or network of poles. Spain Dep., 134 (Compls. Depo. Excerpts, p. 241). On these grounds alone, Mr. Spain's report and testimony are, in their entirety, inadmissible and should be struck.

Moreover, even if Mr. Spain's opinion was not based on this faulty assumption, his rejection of the Eleventh Circuit's analysis and governing methodology would itself render his

testimony and report irrelevant under *Daubert* and *Kumho Tire.* Mr. Spain testified at deposition to his belief that the Court of Appeals' decision in *Alabama Power* is not consistent with *traditional valuation principles. Spain Dep., 48 (Compls. Depo. Excerpts, p. 225).* Acknowledging that *Alabama Power* would require Gulf Power to show either "another buyer waiting in the wings" or a "higher valued use with its own operations," Mr. Spain *rejects* the Court's qualification of a "higher valued use," calling it "at odds with valuation principles and business practices, insofar as it disregards higher valued uses outside of the owning entity's operations." Summary Report, 6; Spain Dep., 216-17 (Compls. Depo. Excerpts, pp. 256-57).

Similarly, his interpretation that the decision requires only a "hypothetical" buyer rather than an actual buyer waiting in the wings, Spain Dep., 214-15 (Compls. Depo. Excerpts, p; 256); Summary Report, 6, is completely unsupported. His reasoning is circular: because he's assumed that fair market value is applicable to pole attachments between Gulf Power and cable television attachers, his interpretation regarding a "hypothetical" buyer must be correct, because "[a]ny interpretation requiring an actual buyer or actual buyers would be inconsistent with the established principles of the fair market value standard." Summary Report, 6. By his own admission, Mr. Spain has "not spoken with anyone at Gulf Power" and he has no knowledge of whether Gulf Power has or had any *actual* buyers waiting in the wings for any of the poles at issue, and thus whether Gulf Power satisfies this alternative prong of the *Alabama Power* test. Spain Dep., 214, 127-28 (Compls. Depo. Excerpts, pp. 256, 239).

Finally, even if Mr. Spain's testimony and report were otherwise admissible, his adherence to replacement cost valuation principles and his misapplication of that methodology renders his opinion irrelevant under *Daubert.* He acknowledged at deposition that in every previous pole attachment matter he's worked on, he's applied a historical cost model, rather than

replacement cost methodology. Spain Dep. at 17-20, 25-26, 85-86 (Compls. Depo. Excerpts, pp. 218, 220, 231). This is consistent with the FCC's approach, which unambiguously rejected the application of replacement cost methodology to pole attachment valuation:

> Just compensation is generally determined by the loss to the person whose property is taken.... The determination of just compensation centers on putting the property owner in as 'good position pecuniarily as he would have occupied if his property had not been taken.' One common measure of loss is the fair market value of the property taken. Fair market value represents a price that reflects what a purchaser in fair market conditions would pay for the property. However, the Supreme Court has concluded that where a property has no market, when market value is too difficult to find, or when the application of a market value standard would result in manifest injustice, other standards and other data must be applied. *Because of the unusual nature of pole attachments, and the nature of the property interest conveyed, the three standard appraisal techniques for determining market value, comparable sales, income capitalization, and replacement costs less depreciation, are particularly unsuited for valuing pole attachments.*

APCO Commission Order, 16 F.C.C.R. 12,209, ¶ 53 (emphasis supplied). The Eleventh Circuit echoed this reasoning as well in *Alabama Power*, upholding the FCC's ruling: "[I]n takings law, just compensation is determined by the loss to the person whose property is taken.... This takings principle is a specific application of the general principle of the law of remedies: an aggrieved party should be put in as good a position as he was in before the wrong, but not better...." 311 F.3d at 1369 (citations omitted). The Gulf Power calculation that Roger Spain rubber-stamps was, nevertheless, calculated through the replacement cost method. Spain Dep. at 37-38, 90 (Compls. Depo. Excerpts, p. 223, 232). Not surprisingly, Mr. Spain admitted at deposition that he was not familiar with the FCC's ruling at the time he conducted his analysis. Spain Dep.,193-96 (Compls. Depo. Excerpts, p. 253).

Mr. Spain's adherence to a non-traditional valuation methodology in valuing Gulf Power's poles is sufficient reason, on its own, to strike his testimony from this case. His misapplication of that methodology only gives the Court further cause to do so. At deposition, Mr. Spain admitted that it is standard valuation practice under the replacement cost method to deduct for physical deterioration and/or obsolescence, and justified his refusal to do so in this case by his insistence that Gulf Power is required by regulatory fiat to maintain its poles as if they were new. Spain Dep., 153-54 (Compls. Depo. Excerpts, p. 245). However, he agrees that utility poles have a generally accepted life span of only 17-20 years, thus undermining his insistence on the purported 'like new' condition of Gulf Power's poles. Spain Dep., 124-26 (Compls. Depo. Excerpts, pp. 238-39). In addition, Mr. Spain testified at deposition that the Gulf Power calculation he has endorsed was based on the average cost for all poles installed over the previous year, not the replacement cost of any of the specific poles at issue in this proceeding. Spain Dep.,154-55, 157-60 (Compls. Depo. Excerpts, pp. 245-46). However, consistent with *Alabama Power,* both the Enforcement Bureau and Chief Judge Sippel have specified that Gulf Power must prove its entitlement to compensation above marginal cost *with respect to specific poles. See Prehearing Order* (Sept. 24, 2004), 4; Order (Dec. 15, 2004), 1-2. Thus Gulf Power's calculations – and Mr. Spain's endorsement of those calculations – directly contravene this tribunal's orders by going outside the scope of the issue, and are therefore inadmissible. Moreover, Mr. Spain referred to and relied on the value of the "elevated corridor" of Gulf Power poles in conducting his analysis regarding the valuation of the pole attachments at stake, indicating that he considered the corridor *between* poles to have enhanced value that should be taken into account. Summary Report, 2-3, Spain Dep., 106-07, 110-11 (Compls. Depo. Excerpts, pp. 236-37). Yet he acknowledged at deposition that the FCC has rejected the

contention that pole owners are entitled to an enhanced or network value. Spain Dep., 192 (Compls. Depo. Excerpts, pp. 252-53).

Mr. Spain's testimony and report are clearly based on unfounded assumptions put forth at the direction of Gulf Power's counsel, and because those assumptions are inconsistent with the Eleventh Circuit's decision in *Alabama Power*, Mr. Spain's opinion has no bearing on, and does not "fit," this case. Accordingly, under Rule 702, his testimony and report must be struck.

5. Complainants Object To The Introduction Of Any Specific Documentary Evidence By Gulf Power At The Hearing That Was The Subject Of Complainants' Discovery Requests But Which Was Not Produced To Complainants

On many occasions throughout the discovery phase of this case, Complainants sought specific documents in their discovery requests, but Gulf Power refused to identify the specific documents and instead simply claimed that they had been "made available for inspection" to Complainants. For example, in Gulf Power Company's Responses to Complainants' Second Set of Requests for Production of Documents (Aug. 26, 2005), when Complainants asked, in Request No.1 for identification of any instance of where Gulf Power was unable to accommodate additional attachments, Gulf's Response was merely that such documents were "made available for inspection." In the *Discovery Order*, FCC 05M-38, 2-3, the Presiding Judge required Gulf Power "to identify the particular documents that are responsive to the request, or Gulf Power must organize and label responsive documents to correspond to each request." Gulf Power never complied with the Judge's requirement, in this instance and in many others. *See also Second Discovery Order,* 5 ("After identifying each such pole, Gulf Power must provide supporting documentation, or must identify specific supporting documentation that has been produced. It is not sufficient to merely refer to a block of documents that were made available at a May 27-28 offer of document inspection"); Complainants' Third Motion to Compel (Oct. 7, 2005)(listing

such instances). Accordingly, Complainants object to the introduction at the hearing of any specific documents that have not been produced previously to Complainants in discovery and/or request that any such evidence be stricken.

6. Complainants Object To the Introduction Of Any Evidence Of Pole "Replacement Costs" On The Ground That The Judge Has Already Ruled That Gulf Power Is Precluded From Using Pole Availability Or Costs To Justify Charging A Rate Above Marginal Costs

Complainants object to the introduction of any evidence by Gulf Power about the replacement costs of new poles on the ground that such evidence is barred by order of the Presiding Judge. In Complainants' Document Request No. 14, Complainants sought all documents referring to sources from which Gulf Power has obtained new poles in order to change-out poles containing Complainants' attachments. In an *Order*, FCC 05M-50 (Oct. 12, 2005), the Presiding Judge ruled that Gulf Power would not have to produce information about sources or pole acquisition costs of new poles but also ruled that "Gulf Power is now precluded from using pole availability or costs to justify charging a rate above marginal costs." The Judge reiterated this order in his *Third Discovery Order*, FCC 05M-56 (Nov. 18, 2005), stating: "Gulf Power is now precluded from using pole availability or pole acquisition costs to justify a higher rate." Yet now, the only calculations upon which Gulf Power relies in the hearing are based upon the cost of acquiring new poles, or replacement costs. *See* Davis testimony, 5-7 (testifying as to the average unit cost of acquiring a new pole). Accordingly, on the additional basis set forth above, Complainants object to the introduction at the hearing of any evidence pertaining to replacement costs, and/or request that any such evidence be stricken.

7. Complainants Further Object To The Introduction Of Any Specific Calculations Pertaining To Gulf Power's Replacement Costs At Or In Excess Of $40.60 On The Grounds That Gulf Has Waived Any Such Claim

Complainants further object to the introduction of any Gulf Power testimony, including testimony by Ms. Terry Davis, or any exhibits, that include replacement cost calculations in excess of $40.60. In Complainants' Interrogatory No. 1, they asked for the basis and method of calculating the rates for any poles for which Gulf Power claimed "just compensation." *See* Compls. Exh. 56, p. 7. Gulf Power failed to provide such basis and method, claiming that it would provide it at a later time. *Id.* In the *Discovery Order*, FCC 05M-38, the Presiding Judge ruled that "Complainants should receive this information well in advance of the hearing," and, more specifically, ruled that

> Gulf Power has effectively waived ever charging Complainants a $40.60 rate, and *has retained expert assistance to calculate a lesser rate* that meets 'just compensation' (expected to be an amount more than the FCC Formula rate).

Discovery Order, FCC 05M-38, 7 n.7 (emphasis added). The Judge further noted "Gulf Power does not intend to seek that rate in this proceeding," FCC 05M-38, 7, and denied Complainants the opportunity to obtain discovery about the $40.60 rate on the basis that Gulf "has retained expert assistance to calculate a lesser rate." Yet, in the testimony of Ms. Terry Davis, Gulf Power now is specifically seeking a rate of $40.60 for the year 2001, *see* Davis testimony, 6, and is seeking substantially more than $40.60 in 2003, 2004, 2005, up to a total of approximately $65 per pole per year for the year 2006. Accordingly, Complainants object to the introduction at the hearing of any rate calculations by Gulf Power at or in excess of $40.60 and/or request that any such evidence be stricken.

8. Complainants Object To The Introduction Of Any Evidence By Gulf Power That It Has A "Higher Valued Use" For Space On Poles Containing Complainants' Attachments

Complainants object specifically to the introduction of any evidence by Gulf Power concerning a "higher valued use" for space on poles containing Complainants' attachments on the basis of the Presiding Judge's discovery rulings. In Complainants' Interrogatories 34 and 35, Complainants sought information about all instances of where Gulf Power had informed cable attachers that it needed to reserve space for its own use. See Compls. Ex. 56, p. 18; Ex. 58, pp. 10-11. In the *Third Discovery Order*, FCC 05M-56, the Judge observed that Gulf Power had stated in its answers to these interrogatories that it had no written documents pertaining to the reservation of space (apart from its general "spec plates") and that Gulf Power had admitted that "it does not treat further space needs on a pole by pole basis." The Presiding Judge further ruled:

> Gulf Power stated that its practice has been to permit attachers to pay the cost of modifications needed to maintain attachments, 'thereby vitiating any claim that Gulf Power is ever deprived of the opportunity to put space on its poles to a higher reduced [sic] use of its own.' (See Gulf Power answers). Based on its own admissions, Gulf Power may not offer evidence beyond its answers to Interrogatory No. 35.

FCC O5M-56, 13. Accordingly, Complainants object to the introduction at the hearing of any evidence of an alleged "higher valued use" that Gulf Power claims to have for space on poles containing Complainants' attachments and/or request that any such evidence be stricken.

9. Complainants Move To Strike Gulf Power's Exhibits 1-3 From Evidence, The Affidavits Of Michael Dunn

Complainants object to the hearsay affidavits of Michael Dunn being admitted into evidence. Mr. Dunn is a witness who will be testifying live in this proceeding on behalf of Gulf Power. His affidavits, filed nearly six years ago (and comprising all of Volume 1 and part of Volume 2 of Gulf Power's exhibits) are not only hearsay statements for which no exception has

been offered by Gulf Power (or explanation that they are not being offered for the truth of the matters asserted therein) but also include multiple attachment documents that have not been separately identified or determined to be relevant to the issues here. Moreover, the affidavits and attachments, which are highly argumentative, are part of the pre-hearing record as they were submitted in the underlying docket while the matter was before the Enforcement Bureau. The Bureau previously rejected Gulf Power's reliance upon the Dunn affidavits as justification for the use of a "replacement cost" methodology. *See* 18 F.C.C.R. 9599 at ¶¶ 14-15 and nn. 51-53. Moreover, the Presiding Judge determined in the admission session on April 10, 2006 not to admit in evidence other filings, particularly argumentative filings, from earlier stages of the underlying proceeding. Accordingly, Gulf Power exhibits 1-3, the three affidavits of Michael Dunn, should be stricken from evidence.

Respectfully submitted,

John D. Seiver
Geoffrey C. Cook
Rita Tewari
COLE, RAYWID & BRAVERMAN, LLP
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, DC 20006
(202) 659-9750

Michael A. Gross
Vice President,
Regulatory Affairs and
Regulatory Counsel
FLORIDA CABLE TELECOMMUNICATIONS ASS'N, INC.
246 East Sixth Ave., Suite 100
Tallahassee, FL 32303
(850) 681-1990

Counsel for

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, COX COMMUNICATIONS GULF COAST, L.L.C., COMCAST CABLEVISION OF PANAMA CITY, INC., MEDIACOM SOUTHEAST, L.L.C., and BRIGHT HOUSE NETWORKS, L.L.C.

April 18, 2006

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, *Complainants' Trial Brief*, has been served upon the following by electronic mail and via Federal Express (non-FCC recipients) or hand-delivery (FCC recipients) on this the 18th day of April, 2006:

J. Russell Campbell
Eric B. Langley
Jennifer M. Buettner
BALCH & BINGHAM LLP
1710 Sixth Avenue North
Birmingham, Alabama 35203-2015

Ralph A. Peterson
BEGGS & LANE, LLP
501 Commendencia Street
Pensacola, Florida 32591

Rhonda Lien
Federal Communications Commission
445 12th Street, S.W. – Room 4-C266
Washington, D.C. 20554

James Shook
Federal Communications Commission
445 12th Street, S.W. – Room 4-A460
Washington, D.C. 20554

Lisa Griffin
Federal Communications Commission
445 12th Street, S.W. – Room 4-C343
Washington, D.C. 20554

Sheila Parker
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, D.C. 20554

Kris Monteith
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W. – Room 7-C485
Washington, D.C. 20554